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In the Supreme Court of the United States

OCTOBER TERM, 1995

DARLENE WALTERS,
Petitioner,
v.
METROPOLITAN EDUCATIONAL ENTERPRISES, INC., and LEONARD BIEBER,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE WOMEN'S LEGAL DEFENSE FUND; AMERICAN ASSOCIATION OF RETIRED PERSONS; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION-WOMEN'S RIGHTS PROJECT; AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; AMERICAN NURSES ASSOCIATION; CALIFORNIA WOMEN'S LAW CENTER; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, INC.; DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.; EQUAL RIGHTS ADVOCATES, INC.;

(Additional Amici Listed on Inside Cover)

AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; LABORERS' INTERNATIONAL UNION OF NORTH AMERICA; LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.; MEXICAN AMERICAN LEGAL DEFENSE FUND; NATIONAL COUNCIL ON FAMILY RELATIONS; NATIONAL COUNCIL OF JEWISH WOMEN, INC.; NATIONAL EMPLOYMENT LAW PROJECT; NATIONAL WOMEN'S LAW CENTER; NOW LEGAL DEFENSE AND EDUCATION FUND; WIDER OPPORTUNITIES FOR WOMEN; THE WOMAN ACTIVIST FUND, INC.; WOMEN EMPLOYED; AND WOMEN'S LAW PROJECT

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are women's rights, civil rights, civil liberties, religious, and labor organizations that work to eliminate all forms of discrimination in the workplace.[2] The case before this Court is of great interest to *amici* because the outcome will carry important implications for the civil rights protections available to significant numbers of workers. More specifically, this case will decide the extent to which hourly and part-time workers on an employer's payroll will be counted when determining whether that employer has the requisite number of employees to trigger statutory coverage—and thus whether its workers are protected by federal antidiscrimination law.

SUMMARY OF ARGUMENT

The courts below are split over the extent to which hourly and part-time workers should be counted when determining whether an employer has the requisite number of employees to trigger title VII coverage. The "payroll" method counts all workers who are on the employer's payroll for each day of the week, regardless of whether they are physically present at work each day of the week. The "day-by-day" approach counts hourly and part-time workers as employees only when they are actually present at work or on paid leave for each working day of the week.

No sound public policy rationale supports the use of the day-by-day approach over the payroll method. Not only is the day-by-day approach completely without basis in either the text or legislative history of title VII, it ignores the realities of common workplace practice and thus generates results that are both absurd and inconsist-

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[1] Petitioners and Respondent have consented to the filing of this brief and the parties' letters of consent have been filed with the clerk of this Court.

[2] Individual statements of interest of the *amici* are attached as the Appendix to this brief.

ent with title VII's purposes. Moreover, the day-by-day approach arbitrarily limits title VII coverage of significant numbers of employers who employ workers most in need of protection against invidious discrimination.

In contrast, use of the payroll method avoids the absurd and unfair consequences generated by the day-by-day approach. It also ensures consistent interpretation of parallel language in the Family and Medical Leave Act. Finally, unlike the day-by-day approach, the payroll method is simple to apply and does not unreasonably burden parties seeking to enforce title VII's guarantees of equal employment opportunity.

ARGUMENT

NO SOUND PUBLIC POLICY RATIONALE SUPPORTS THE ADOPTION OF THE "DAY-BY-DAY" APPROACH OVER THE "PAYROLL" APPROACH WHEN DETERMINING WHETHER AN EMPLOYER IS COVERED BY FEDERAL ANTIDISCRIMINATION LAW.

Title VII of the Civil Rights Act of 1964—which prohibits job discrimination on the basis of race, sex, color, religion, and national origin—applies to any employer "engaged in an industry affecting commerce who has fifteen or more employees *for each working day* in each of twenty or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 2000e(b) (1994) (emphasis added). The question before the Court is whether title VII applies to an employer who maintains fifteen or more employees on its payroll for every working day for the requisite number of weeks even if fewer than fifteen employees are physically present at work or on paid leave for each day of each week.[3]

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[3] This case will also likely determine the test to be applied when determining coverage under the Age Discrimination in Employment Act, 29 U.S.C. § 630(b) (1994), and the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A) (1994), which borrow title VII's definition of "employer" almost word for word.

The lower courts have developed two different approaches for determining whether an employer has the requisite number of employees for title VII purposes. The First and Fifth Circuits have endorsed the "payroll" method, which counts all workers who are on the employer's payroll for each day of the week—regardless of whether they are physically present at work each day. *Vera-Lozano v. International Broadcasting*, 50 F.3d 67, 69-70 (1st Cir. 1995); *Thurber v. Jack Reilly's, Inc.*, 717 F.2d 633, 634 (1st Cir. 1983), *cert. denied*, 466 U.S. 904 (1984); *Dumas v. Town of Mount Vernon*, 612 F.2d 974, 979 n.7 (5th Cir. 1980). Workers who are added to or dropped from the payroll midweek are not counted under the payroll method for the days that they are not on the payroll.

In contrast, the Seventh and Eighth Circuits have adopted the "day-by-day" approach, which counts hourly and part-time [4] workers as employees only when they are

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[4] It remains unclear whether the rule announced in the courts below is intended to apply to part-time salaried workers as well as to full- and part-time hourly workers. For example, the Seventh Circuit stated in its opinion below that the day-by-day method "counts all salaried employees toward the minimum, but takes a different approach towards hourly *or* part-time workers. Such workers are considered employees only on days when they are physically present at work or on paid leave." 60 F.3d at 1227 (emphasis added). This formulation does not offer clear guidance about how to treat part-time *salaried* workers.

However, the *Zimmerman* decision that the Seventh Circuit purported to reaffirm in this case more clearly focused on the distinction between all salaried and hourly workers (regardless of full- or part-time status) by holding only that the day-by-day method excludes "*hourly-paid* workers as employees for days when they were neither working nor on paid leave." *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 354 (7th Cir. 1983) (emphasis added).

On the other hand, in *EEOC v. Garden and Assocs., Ltd.*, the Eighth Circuit mentioned only part-time workers without regard to hourly or salaried status when it held that "part-time employees who are neither working nor on paid leave during each day of the work week" are not counted towards a company's total number of

actually physically present at work or on paid leave for each working day of the week. *EEOC v. Metropolitan Educ. Enters., Inc. ("Walters")*, 60 F.3d 1225 (7th Cir. 1995); *EEOC v. Garden and Assocs., Ltd.*, 956 F.2d 842 (8th Cir. 1992) (interpreting the ADEA's definition of employer); *Zimmerman v. North Am. Signal Co.*, 704 F.2d 347, 353-54 (7th Cir. 1983) (ADEA); *McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983). Under this test, salaried workers are apparently considered employees for the entire workweek regardless of their physical presence at work or their leave status. *Walters*, 60 F.3d at 1227.

In this brief, *amici* explore the two methods' very different policy consequences, demonstrating how the day-by-day method generates absurd results that undercut title VII's dual purposes of remedying and deterring job discrimination.[5] Indeed, *amici* contend that there is absolutely *no* sound public policy rationale for adopting the day-by-day approach over the payroll method.

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employees under the ADEA. 956 F.2d at 843. *See also McGraw v. Warren County Oil Co.*, 707 F.2d 990, 991 (8th Cir. 1983) (rejecting assertion that part-time workers who did not work each day of the workweek should be considered employees for the entire week).

Thus the various lower court opinions adopting the day-by-day approach are unclear about whether part-time salaried workers are considered employees for those weeks in which they are not physically present at work or on paid leave for each working day. Of course, *amici* urge this Court to reject the day-by-day approach in any event.

[5] The Petitioners' briefs explain, *inter alia*, why both the text and legislative history of title VII support the use of the payroll approach.

A. The Day-by-Day Approach Generates Results That Are Both Absurd and Inconsistent With the Purposes of Title VII Because It Ignores the Realities of Common Workplace Practice.

The court below held that hourly and part-time workers are to be considered employees for purposes of determining an employer's title VII coverage only when they are physically present at the workplace or on paid leave for each day of the workweek. Not only is such a limitation completely without basis in either the text or legislative history of title VII, it ignores the realities of common workplace practice and thus undermines fair and effective statutory enforcement. As a result, the day-by-day approach generates a range of absurd results that require its rejection as an erroneous interpretation of title VII.

First, the day-by-day method excludes part-time hourly workers who do not report to work every day—while including part-time hourly workers who work the same or fewer hours by reporting every day of the week for part of the day. Thus, under the day-by-day approach, a worker who works eight hours a day for four days a week (a total of 32 hours) would not be considered in determining whether her employer is covered by title VII; on the other hand, her colleague working four hours a day for five days a week (a total of 20 hours) *would* be counted. Such a distinction is completely arbitrary and irrational and, in fact, fails to produce an accurate determination of the size of an employer's workforce.[6]

Similarly, the day-by-day approach also excludes full-time hourly workers who work on what are known as "compressed workweeks" by working fewer days each week, but for longer hours each day. For example, under

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[6] Not only does the day-by-day approach create a series of arbitrary and unfair results, it encourages employers to manipulate their hiring and scheduling practices to escape the nondiscrimination requirements imposed on employers of equal or lesser size.

the day-by-day approach, a full-time worker working a compressed workweek of ten hours a day, four days a week would not be counted; however, her collegue working the same number of hours each week spread over five days *would* be included in the count. Again, this distinction is completely nonsensical and carries significant practical consequences: the Bureau of Labor Statistics, for example, reports that 43 percent of establishments surveyed provide compressed workweeks and other forms of flexible scheduling as an option for their workers[7]; more than 12 million full-time workers—15% of the full-time workforce—work on flexible schedules.[8]

The day-by-day approach's unreasonably rigid reading of the phrase "for each working day" generates other arbitrary outcomes as well. For example, the day-by-day method could be read to exclude from consideration the worker who works only five days a week for a restaurant employer open for business seven days a week.

The day-by-day approach generates yet another set of absurd results because of its unwarranted distinction between hourly workers on paid and unpaid leave. Hourly workers on paid vacation would be counted under the day-by-day approach, while hourly workers who are on unpaid leave—such as unpaid bereavement leave, unpaid leave for jury duty, or unpaid family or medical leave to respond to a family or medical emergency—would not.[9]

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[7] Employee Benefit Research Institute, *The Changing Environment of Work and Family*, tbl. 8 (June 1993), citing U.S. Dept. of Labor, Bureau of Labor Statistics, *BLS Reports on Employer Child-Care Practices*, news release USDL 88-7 (Jan. 7, 1988).

[8] Bureau of Labor Statistics, Dep't of Labor, *Workers on Flexible and Shift Schedules* 1 (Aug. 14, 1992).

[9] In fact, more hourly employees than salaried workers take leave under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 *et seq.* (1993). More specifically, hourly employees make up 55% of those who take leave under the FMLA. Because much of

Furthermore, strict application of the day-by-day method would even exclude workers on other sorts of work schedules such as those where the hourly worker performs some paid work from home and is not actually "physically present" at work for some part of the workweek. Again, a significant number of American workers engage in such work patterns: in 1991, 1.9 million non-self-employed workers worked at home for pay for some part of the week.[10] Under the day-by-day approach, hourly workers who telecommuted or otherwise performed one day's work at home in a week would likely be excluded when determining whether their employer was covered by title VII.

Although the sorts of work schedules described above have become increasingly prevalent in recent years,[11] these various work arrangements were by no means unknown at the time of title VII's enactment. Indeed, the available evidence suggests that Congress was aware of such work arrangements and intended that workers engaged in them

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that leave is unpaid—nearly 43% of hourly workers receive no pay at all during their FMLA leave, while another 25% are paid for only a portion of their leave—many of those workers would not be considered employees under the day-by-day apprach for any week during which they took one or more days of FMLA leave. *See* Commission on Family and Medical Leave, *A Workable Balance: Report to Congress on Family and Medical Leave Policies* 266, 282 (1996).

[10] William G. Deming, *Work at Home: Data from the CPS*, Monthly Lab. Rev., Feb. 1994, tbl. 1.

[11] For example, the number of employers offering flexible scheduling increased from 51% in 1990 to 73% in 1995; similarly, the number of employers offering work-at-home options nearly doubled from eight percent in 1990 to 15% in 1995. *Nearly All Firms in Five-Year Survey Report Now Offering Dependent Care*, National Rep. on Work and Family (BNA), Mar. 15, 1996, at 45-46, citing Hewitt Associates, *Salaried Employee Benefits Provided by Major U.S. Employers in 1990 and 1995: A Comparison Study* (1996).

would be counted as employees when determining an employer's title VII coverage.

As the First Circuit emphasized, during congressional consideration of the Civil Rights Act in 1964 Senator Dirksen stated that title VII's definition of "employer" was modelled on that contained in the Unemployment Compensation Act (UCA), 26 U.S.C. § 3304 (1954). *Thurber*, 717 F.2d at 634, citing 110 Cong. Rec. 13,087 (1964). The Internal Revenue Service (IRS), in turn, had issued a 1955 ruling interpreting the UCA's definition of employer that explicitly recognized the existence of arrangements equivalent to compressed workweeks and part-time schedules:

> Question 1. Are employees considered to be in the employ of an employer during the entire week where, because of the long daily hours of employment, the employees are granted 1 or 2 days of absence each week and substitutes replace the absent regular employees?
>
> Answer. The regular employees should be considered to be in the employ of the employer during the entire week. The basis of this conclusion is that the employer-employee relationship which exists between the parties does not terminate by reason of their absence from duty for 1 or 2 days during the week. If the employer-employee relationship exists, it is immaterial that the employee performs no physical service for the employer on certain days of the week.
>
> * * * *
>
> Question 6. Where an employer could not get full-time employment in his area he had to permit housewives to work half days 3 days per week. Because of this situation, he pays part-time salaries to 12 people each week even though there are never more than 3 employees in his shop at any one time, nor more than 6 on any one day. What number of employees should be recorded for each week in this situation?

> Answer. If the employees are engaged with the understanding that they will perform services for the employer each week, the employer would have 12 individuals in his employ on each day of the week until the employer-employee relationship is terminated.

Rev. Rul. 55-19, 1955-1 C.B. 497, 498-99. Thus the IRS interpreted the UCA to require the inclusion of employees involved in these sorts of work arrangements when determining an employer's coverage under that Act.

If Congress modelled its definition on that of the UCA, it is reasonable to assume that it was aware of agency interpretation of the UCA and intended a similar interpretation for title VII's definition of "employer." *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 509, 536 (1982); *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979). It is thus fair to conclude that Congress intended workers participating in work arrangements addressed by the IRS ruling to be included under title VII's definition of "employer" as well.

In short, the day-by-day method would have generated unreasonable results in light of workplace practice 30 years ago just as it does today. It should thus be rejected as an erroneous interpretation of title VII. *See, e.g., EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120-21 (1988) (Court "need not and should not countenance" respondent's interpretation of title VII that generates absurd results contrary to statutory purposes).

B. The Day-by-Day Method Arbitrarily Limits Title VII's Coverage of Employers Who Employ Workers Most in Need of Protection Against Invidious Discrimination.

Not only does the day-by-day method generate absurd results, it significantly limits the reach of antidiscrimination protections by arbitrarily excluding many hourly and part-time workers when determining employer coverage. By unfairly and unnecessarily limiting statutory coverage

of employers who employ these workers, the day-by-day approach undermines title VII's purposes of remedying and deterring discrimination.

Indeed, use of the day-by-day method limits protections against job discrimination for large numbers of workers. Nearly 800,000 employers—employing more than 10 million workers—report, like the Respondent, a payroll size of between 10 and 19 workers. Bureau of the Census, Dep't of Comm., *County Business Patterns 1993*, tbl. 1b (1995).[12] Moreover, more than half of all American workers are employed on an hourly basis, Bureau of Labor Statistics, Dep't of Labor, Annual Average Current Population Survey Data (1995) (unpublished), and almost 24 million workers—nearly one in five—are employed part-time. Bureau of Labor Statistics, Dep't of Labor, *Contingent and Alternative Employment Arrangements* tbls. 1, 2 (Aug. 1995). Because hundreds of thousands of employers are at or around title VII's coverage threshold—and because a significant number of their employees are likely to be hourly and/or part-time workers—use of the day-by-day method threatens arbitrarily to remove large numbers of these employers and their workers from federal antidiscrimination guarantees.[13]

In addition, use of the day-by-day approach means that hourly workers may unintentionally but unavoidably compromise their protections under federal antidiscrimination

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[12] Thus twelve percent of all employers fall within just a few workers of title VII's jurisdictional minimum; 11 percent of all workers work for employers in this range. *County Business Patterns 1993* at fig. 1.

[13] Similarly, another half a million employers employing an additional 15 million workers (eight percent of all employers and 16 percent of all workers) list payrolls of between 20 to 49 workers. *Id.* Using the day-by-day method to exclude part-time and hourly workers would remove many of these employers and their workers from the protections of title VII and the ADA (covering employers of 15 or more), as well as the ADEA (covering employers of 20 or more).

law when they assert their rights to family and medical leave. Hourly workers who use unpaid leave designed to enable them to care for their family members or for their own serious health conditions may find that their leave-taking removes their employer from the reach of federal antidiscrimination law.

For example, an hourly worker on unpaid medical leave for cancer, HIV, or another disability would not be counted under the day-by-day method. Her leavetaking thus increases the likelihood that her employer would not be covered by the ADA at a time when she might most need its protections. Similarly, an hourly worker who has taken unpaid family and medical leave for pregnancy and childbirth would not be counted under the day-by-day approach, again reducing the chance that her employer is covered by title VII at a time when she may most need it.[14] Moreover, workers who take advantage of flexible work arrangements—e.g., workers who work part of the week at home or who use compressed workweeks—to accommodate their family caregiving responsibilities may well find themselves in the same situation.

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[14] Hourly workers are no less likely to be victims of discrimination than are full-time salaried workers. In fact, discrimination victims are *more* likely to be hourly workers simply because there are more hourly than salaried workers in the American economy. *See* Bureau of Labor Statistics, Dep't of Labor, Annual Average Current Population Survey Data (1995) (unpublished). And surely the pain and humiliation of discrimination are no less keenly felt by hourly workers than by their salaried counterparts. Indeed, hourly workers—who have on average significantly lower incomes than salaried workers—are likely to experience even greater suffering than salaried workers when discrimination causes job loss and other adverse economic effects. Furthermore, by irrationally distinguishing between salaried and hourly workers, the day-by-day method disproportionately and unfairly excludes women and people of color, who make up the majority of hourly and part-time workers. *See id.*

Because title VII should be construed liberally in light of its remedial purposes, *Quijano v. University Fed. Credit Union*, 617 F.2d 129, 131 (5th Cir. 1980); *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th Cir. 1977) (title VII should be liberally construed when determining employer coverage); *see also Gomez v. Toledo*, 446 U.S. 635, 639 (1980) (remedial civil rights legislation should be construed generously to further its primary purposes), any statutory ambiguities should be resolved in favor of coverage. *Armbruster v. Quinn*, 711 F.2d 1332, 1341 (6th Cir. 1983) ("Were there a doubt or ambiguity in the matter [of defining the term 'employee' under title VII,] we would resolve it in favor of coverage."); *Spirides v. Reinhardt*, 613 F.2d 826, 831 (D.C. Cir. 1978) (title VII's ambiguities should be resolved in favor of the complaining party). Indeed, courts adopting the payroll method have done so in part in recognition of the fundamental principle that title VII is a remedial statute that should be broadly interpreted to accomplish its purpose. *E.g., Thurber*, 717 F.2d at 634-35. Resolving any ambiguities in favor of the plaintiff by adopting the payroll approach is particularly appropriate here where the day-by-day approach produces such absurd results counter to title VII's purposes.

C. The Payroll Method Should Be Adopted to Ensure Consistent Interpretation of Identical Language in the Family and Medical Leave Act.

As discussed above, the day-by-day approach generates a wide range of absurd and arbitrary results that undermine the purposes of title VII and other antidiscrimination statutes. The payroll method eliminates such consequences while also ensuring consistent interpretation of identical definitional language in similar statutes.

The Family and Medical Leave Act (FMLA) adopts title VII's definition of covered employers (except that an employer must have 50, rather than 15, workers for the requisite number of weeks in order to be covered by

the FMLA). 29 U.S.C. § 2611(4)(A)(i)(1994). Both the House and the Senate Committee Reports on the FMLA explicitly approve of the use of the payroll approach when counting employees for FMLA purposes.[15] S. Rep. No. 3, 103d Cong., 1st Sess. 21-22 (1993); H.R. Rep. No. 8, 103d Cong., 1st Sess. 33-34 (1993). The Committee Reports state that

> "[t]he quoted language parallels language used in Title VII of the Civil Rights Act of 1964 and is intended to receive the same interpretation. As most courts and the EEOC have interpreted this language, '[e]mploys . . . employees for each working day' is intended to mean 'employ' in the sense of maintain on the payroll. It is not necessary that every employee actually perform work on each working day to be counted for this purpose."

S. Rep. No. 3 at 22, H.R. Rep. No. 8 at 32. Accordingly, the Department of Labor's regulations implementing the FMLA provide for use of the payroll method when determining FMLA coverage. 29 C.F.R. § 825.105(b)-(d) (1995).

Thus, the payroll method is and will be used to interpret the FMLA's definition of employer. Adopting the payroll approach when interpreting the same language in title VII (and the ADEA and ADA) would ensure consistent and harmonious interpretation of parallel definitions across employment rights statutes.

D. The Payroll Method Is Much Simpler for Parties and Enforcement Agencies to Apply.

Because employers routinely keep payroll records in order to comply with federal and state tax withholding, unemployment compensation, disability insurance, and

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[15] Indeed, as discussed more fully in Petitioners' briefs, the Committee Reports also indicated that the 103rd Congress considered the payroll method to be the proper interpretation under title VII as well as the FMLA.

other legal requirements, determining employer coverage under the payroll method is relatively easy. In contrast, employers are not generally required to keep records that track the sort of information needed for a day-by-day analysis, such as the actual days each week that each employee worked or was on paid leave.

Indeed, reconstructing the records necessary to apply the day-by-day method can be very difficult and time-consuming for all the parties involved—especially overburdened agencies like the EEOC, not to mention individual plaintiffs with limited resources or who are unrepresented by counsel. In this case, for example, the parties spent eight months examining Respondent's payroll registers, time cards, work diaries and other records. R. at 37. The day-by-day approach's clumsiness actually rewards employers who keep sloppy records, allowing them to delay and confuse the proceedings. Once again, the public policy consequences of the day-by-day method dictate its rejection in favor of the payroll approach.[16]

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[16] As explained more fully in the Petitioners' briefs, the EEOC's use of the payroll method is entitled to deference given the agency's primary enforcement authority for title VII and other antidiscrimination statutes. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988); *see also Holly Farms Corp. v. NLRB*, 64 U.S.L.W. 4269, 4271 (Apr. 23, 1996) ("Courts, in turn, must respect the judgment of the agency empowered to apply the law 'to varying fact patterns,' even if the issue 'with nearly equal reason [might] be resolved one way rather than another.' ") (citations omitted). As this brief demonstrates, the EEOC's use of the payroll method is by far the more reasonable approach and is thus entitled to deference.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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